Supreme Court, U.S.
FILED

No. 001528

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In The

Supreme Court of the United States

FRED KAYNE; STEPHEN KAYNE; MILTON T. OKUN; ROSEMARY OKUN; MERRILL, LYNCH, PIERCE, FENNER & SMITH, INC. AS CUSTODIAN FOR MILTON T. OKUN INDIVIDUAL RETIREMENT ACCOUNTS; DON WOHL; GLEN TOBIAS; KEN BERG; ROBERT A. BRONSTEIN; BRONSTEIN FAMILY TRUST; BRUCE BURNAM; MARCIA BURNAM; KATHLEEN A. COHEN; WILLIAM CORBETT; CUTLER FAMILY TRUST OF 1989; MARTIN GOLDFARB, M.D.; RICHARD GUNTHER; HARPEL PARTNERS, L.P.; HARPEL WHEELOCK PARTNERS, L.P.; HARPEL INTERNATIONAL, LTD.; RICHARD L. MILSNER; JOEL RUMM, D.M.V.; VICTOR SCARAVILLI; TRI S PARTNERS; DREILÄNDER BETEILIGUNG OBJEKT DLF 93/14-WALTER FINK-KG, a limited partnership formed under the laws of Germany; and ZWÖLFTE DREILÄNDER BETEILIGUNG DLF 92/12-WALTER FINK-KG, a limited partnership formed under the laws of Germany,

Petitioners,

vs.

MTC ELECTRONIC TECHNOLOGIES CO., LTD., a corporation organized under the laws of Canada; MIKO LEUNG; SIT WA LEUNG; EDILBERTO V. POZON; PETER JENSEN; THOMAS LENAGH; ROBERT FARR; DAIWA SECURITIES AMERICA, INC.; BDO DUNWOODY WARD MALLETTE; MTC INTERNATIONAL CO., LTD; MTC ELECTRONICS (H.K.); MONA ELECTRONIC INTERNATIONAL CO., LTD.; DAVID WONG; GOODWIN WANG; ALAN LEUNG; RONALD W. DRIOL; HONG KONG BANK OF CANADA; and GRANDE HOLDINGS, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

LAWRENCE H. NAGLER
Counsel of Record
NAGLER & ASSOCIATES
2300 S. Sepulveda Blvd.
Los Angeles, CA 90064
(310) 473-1200
For Petitioners Fred Kayne, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

3100

QUESTION PRESENTED

1. Can a case coordinated by the JPML and transferred to another district be forced to remain in the transferee district for further pretrial proceedings after coordinated proceedings have ended?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below are those named in the caption and plaintiffs in the MTC Class Action.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Fred Kayne; Stephen Kayne; Milton T. Okun; Rosemary Okun; Merrill, Lynch, Pierce, Fenner & Smith, Inc. as Custodian for Milton T. Okun Individual Retirement Accounts; Don Wohl; Glen Tobias; Ken Berg; Robert A. Bronstein; Bronstein Family Trust; Bruce Burnam; Marcia Burnam; Kathleen A. Cohen; William Corbett; Cutler Family Trust of 1989; Martin Goldfarb, M.D.; Richard Gunther; Harpel Partners, L.P.; Harpel Wheelock Partners, L.P.; Harpel International, Ltd.; Richard L. Milsner; Joel Rumm, D.M.V.; Victor Scaravilli; Tri S Partners; Dreiländer Beteiligung Objekt DLF 93/14-Walter Fink-KG, a limited partnership formed under the laws of Germany; and Zwölfte Dreiländer Beteiligung DLF 92/12-Walter Fink-KG, a limited partnership formed under the laws of Germany, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, dated January 9, 2001, which appears in the Appendix at App. 1.

The decision denied a writ of mandamus following the Judicial Panel on Multidistrict Litigation's ("JPML") refusal to order remand, based upon the transferee District Court's refusal to suggest remand and the case of *In re Patenaude*, 210 F.3d 135 (3d Cir. 2000), *cert. denied*, 121 S.Ct. 565 (2000). *In re Patenaude* is inconsistent with 28 U.S.C. Section 1407(a) and this Court's opinion in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), holding that remand is required at the end of coordinated proceedings.

OPINIONS BELOW

The opinion of the Second Circuit appears in the Appendix at App. 1 and is unpublished.

The decision of the JPML appears in the Appendix at App. 3 and is unpublished.

The decision of the District Court appears in the Appendix at App. 6 and is unpublished.

The report and recommendation of the District Court Magistrate Judge appears in the Appendix at App. 8 and is unpublished.

The prior decision of the District Court appears in the Appendix at App. 11 and is unpublished.

JURISDICTIONAL STATEMENT

The decision of the Court of Appeals was entered on January 9, 2001.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. Section 1407 provides in pertinent part:

> "(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers may be made

by the Judicial Panel on Multidistrict Litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.

. . .

(f) The panel may prescribe rules for the conduct of its business not inconsistent with acts of Congress and the Federal Rules of Civil Procedure."

JPML Rule 7.5(a) provides:

"Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel and requests for assignment of such actions to the Section 1407 transferee judge should be made in accordance with the local rules for the assignment of related actions."

JPML Rule 7.6(d) provides in pertinent part:

"The Panel is reluctant to order remand absent a suggestion of remand from the transferee district court. If remand is sought by motion of a party, the motion shall be accompanied by:

(i) an affidavit reciting

(A) whether the movant has requested a suggestion of remand from the transferee district court, how the court responded to any request, and if no such request was made, why;

(B) whether all common discovery and other pretrial proceedings have been completed in the action sought to be remanded, and if not, what remains to be done; and

(C) whether all orders of the transferee district court have been satisfactorily complied with, and if not, what remains to be done; and

(ii) a copy of the transferee district court's final pretrial order, where such order has been entered."

STATEMENT OF THE CASE

The MTC Class Action

In early 1993, certain individuals filed securities class actions later denominated *In Re MTC Electronic Technologies Securities Litigation* in the U.S. District Court for the Eastern District of New York and in the U.S. District Court for the Central District of California. Counsel filing on behalf of plaintiffs in the Central District of California stipulated to dismissal of that action and consolidation of all MTC Class Action litigation in the Eastern District of New York. The MTC Class Action was settled in large part in October, 1997 with a pending trial date in January, 1998. Court approval of the Class Action settlement was entered on October 15, 1998. Defaults were entered in the Class Action against nonsettling defendants Miko Leung, Sit Wa Leung and Alan Leung on both claims by the Class Plaintiffs and cross-claims by various defendants and third party defendants. The only other nonsettling defendant is H.J. Meyers, which has been in involuntary Chapter 7 bankruptcy since 1999; no relief has been sought

from the bankruptcy stay, no claim has been filed in bankruptcy court by counsel for the class plaintiffs or any cross-claimant, and no pretrial order was filed for claims against H.J. Meyers with the MDL district court by the August 31, 2000 deadline for all non-*Kayne* related matters. All other third party actions and cross-claims related to the MTC Class Action have been settled or dismissed.

Kayne v. MTC

The original complaint in *Kayne v. MTC* was filed in the Central District of California in January, 1995. *Kayne* is an action by a group of investors in MTC common stock opting out of the class, and includes some different allegations, causes of action and trading dates. In June, 1995, pursuant to motion by some of the defendants and joined by the class plaintiffs, *Kayne* was transferred by the JPML to the Eastern District of New York pursuant to 28 U.S.C. Section 1407(a) for coordinated pretrial proceedings. *Kayne* was coordinated with the MTC Class Action for discovery, and prior to the Class Action settlement was ordered consolidated for trial as well by the transferee court.

Fact discovery in *Kayne*, limited to items noticed or subpoenaed as of November 14, 1997, has long since been concluded. Expert disclosure and discovery in *Kayne* has been concluded as well, with the exception of depositions of two defense experts which remain.

The Alter Ego Actions Against Grande Holdings

In August, 1997, BDO Dunwoody, a defendant in *Kayne* and in the MTC Class Action, filed a separate action in the Eastern District of New York against Grande

Holdings Limited, alleging that it was the alter ego of Grandetel (MTC's new name), and seeking indemnity and contribution based on MTC's liability. Daiwa Securities America, also a defendant in *Kayne* and in the Class Action, filed a similar action against Grande Holdings in January, 1998. All claims against Grande Holdings related to the Class Action have been settled; the remaining claims relate solely to *Kayne*. No motion was made with the JPML seeking to coordinate the actions against Grande Holdings as part of MDL 1059. Instead, the actions were filed directly in the Eastern District of New York pursuant to JPML Rule 7.5(a). Counsel for plaintiffs in *Kayne* was denied permission to participate in deposition discovery in the Grande Holdings actions, and the parties to those actions have continued to put off expert discovery, the effect of which has been to keep *Kayne* from being remanded for trial.

The Requests for Remand

On October 29, 1997, shortly after the Class Action settlement was announced, the U.S. District Judge in the Eastern District of New York, Honorable John Gleeson, issued an order to show cause requesting briefing as to why *Kayne* should not be immediately remanded to the Central District of California. On November 7, 1997, prior to this Court's ruling in *Lexecon*, Judge Gleeson ruled that *Kayne* would be returned to the Central District of California for trial, but declined to suggest immediate remand. After this Court's *Lexecon* decision, and after the Class Action settlement had been fully approved, on November 16, 1998 plaintiffs in *Kayne* moved Judge

Gleeson pursuant to JPML Rules 7.6(c) and (d) for a suggestion of remand to the JPML for remaining pretrial proceedings and trial. That request for a suggestion was denied on June 1, 1999, at least partially on the ground that third party actions by and against Canaccord Capital Corporation were still pending in the MTC Class Action (and potentially in *Kayne*). Within days after that decision, the Canaccord claims were settled with respect to both *Kayne* and the Class Action. Plaintiffs then renewed their motion for suggestion of remand, which was again denied on October 27, 1999, on the apparent basis that *Kayne* was "coordinated" with the alter ego actions against Grande Holdings, although those alter ego actions relate solely to *Kayne*.

Plaintiffs then sought remand directly from the JPML, which was denied on May 30, 2000 based on the JPML's conclusion that Judge Gleeson of the U.S. District Court for the Eastern District of New York "is in the best position to provide insight as to the future course of *Kayne* and the remaining MDL-1059 proceedings before him." Plaintiffs filed a writ of mandamus to the Second Circuit Court of Appeals. The Second Circuit ordered briefing on the merits and denied the writ without oral argument on January 9, 2001, citing *In re Patenaude*, 210 F.3d 135 (3d Cir. 2000) for the proposition that " 'the fact that all of the proceedings with which the individual action was "coordinated" had already concluded [did not] raise a bar' to continued district court jurisdiction."

REASONS FOR GRANTING THE WRIT

I.

THE SECOND CIRCUIT'S DECISION RELIES ON THE THIRD CIRCUIT'S DECISION IN *IN RE PATENAUDE*, AND *IN RE PATENAUDE* IS CONTRARY TO 28 U.S.C. SECTION 1407(a) AND THIS COURT'S DECISION IN *LEXECON*

In *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), this Court set forth the outer boundaries of impermissible conduct by a transferee court with respect to a matter transferred to it by the JPML, in ruling that the JPML Rule allowing self-transfer for trial was unauthorized and exceeded the statutory authority of the JPML. The JPML's ruling in this case likewise exceeds the statutory authority of the JPML and endorses conduct directly or impliedly prohibited by *Lexecon*.

In re Patenaude, 210 F.3d 135 (3d Cir. 2000) read *Lexecon* as holding that "a proceeding that relates only to a single individual's case or claim can nonetheless be coordinated." 210 F.3d at 143. *Patenaude's* reading of *Lexecon*, however, is incorrect; the cited portion of the *Lexecon* opinion discussed the power of a transferee court to rule on a motion affecting only one of the actions before it. Plaintiffs do not dispute that the transferee court has such authority; however, when there are no longer any coordinated proceedings, allowing further pretrial proceedings in the transferee court violates both 28 U.S.C. Section 1407(a) and *Lexecon*. *Lexecon* never ruled on the situation existing here, i.e., the point at which remand is required when coordinated pretrial proceedings have ended. The procedural posture of *Lexecon* confronted by this Court

was after a judgment following a trial in the transferee court.

The language of Section 1407(a), mandating remand "at or before the conclusion of *such* pretrial proceedings" (*emphasis added*) necessarily refers to the "coordinated or consolidated pretrial proceedings" described earlier in that subsection, since otherwise the modifier "such" in the statute would have no meaning. To the extent that *Patenaude* holds to the contrary, it is simply wrong.

A case cannot be "coordinated" with itself. The Court should clarify the meaning of "coordinated" proceedings, and set forth guidelines as to when, prior to trial, a transferred case should be remanded when the case with which it was ordered coordinated is over and only proceedings specific to the transferred case remain.

II.

REMAND AND TRIAL CANNOT BE PUT OFF INDEFINITELY BY ALTER EGO CASES FOR INDEMNITY AND CONTRIBUTION THAT RELATE SOLELY TO THE CASE SOUGHT TO BE REMANDED, FILED AT THE ELEVENTH HOUR DIRECTLY IN THE TRANSFEREE DISTRICT WITHOUT A JPML DETERMINATION

BDO Dunwoody's complaint against Grande Holdings was filed shortly before the MTC Class Action settlement was agreed to in principle; Daiwa Securities America's complaint against Grande Holdings was filed after settlement of the MTC Class Action.

Grande Holdings participated in the settlement of all aspects of the Class Action, and there are no claims of any

sort pending by or against Grande Holdings related to the Class Action.

The Daiwa Securities America and BDO Dunwoody alter ego actions against Grande Holdings relate solely to *Kayne*, but discovery in those alter ego actions is in no way "coordinated" with *Kayne*; indeed, fact discovery in those cases commenced after fact discovery in *Kayne* had concluded, and counsel for plaintiffs in *Kayne* has been specifically precluded from appearing at depositions in those actions. Forestalling remand of *Kayne* based upon possible future expert discovery in the Grande Holdings actions is allowing the tail to wag the dog, particularly since the JPML never coordinated the *Kayne* case with the actions against Grande Holdings, and there is no independent jurisdictional basis in the Eastern District of New York for the alter ego proceedings against Grande Holdings. Allowing the late-filed alter ego actions to delay remand of *Kayne* is particularly egregious, since alter ego claims are normally filed after there is a judgment establishing the underlying liability against the initial defendant to which alter ego status is claimed to attach. See, e.g., *Wm. Passalacqua Builders v. Resnick Developers South*, 933 F.2d 131, 142 (2d Cir. 1991).

To allow filing of an allegedly separate alter ego action in the transferee court to forestall remand of the only case to which the alter ego claims apply, without an order by the JPML coordinating the actions, violates 28 U.S.C. Section 1407's requirements. Nowhere in the JPML statute is there any authorization of coordination by rule rather than by determination of the JPML panel itself. JPML rules cannot extend beyond what the statute authorizes, since under 28 U.S.C. Section 1407(f) such rules

must not be "inconsistent with acts of Congress and the Federal Rules of Civil Procedure." The only basis ever raised for alleged coordination of the alter ego cases with *Kayne* is JPML Rule 7.5(a). Like former JPML Rule 14(b), which was held to be in excess of the JPML's rulemaking authority in *Lexecon*, JPML Rule 7.5(a) exceeds the authority of 28 U.S.C. Section 1407(a) by allowing the coordination process to bypass the JPML.

III.

ALLOWING THE TRANSFEREE JUDGE'S FAMILIARITY WITH THE CASE TO THWART REMAND WOULD ALWAYS COUNSEL AGAINST REMAND AT ANY TIME PRIOR TO TRIAL

The Report and Recommendation of Chief Magistrate Judge Chrein, which is the only ruling that even attempts to detail the reasons for denying remand, makes much of Judge Gleeson's familiarity with the facts of the case as a reason to deny remand. The transferee judge's familiarity with the facts of the case, however, would always counsel against remand, since the transferee judge would always be more familiar with the facts of the case. The transferee judge will be more familiar with the facts of the case even if coordinated proceedings have completely concluded, i.e., if there is nothing left but the action sought to be remanded. That cannot be the meaning of 28 U.S.C. Section 1407(a), which mandates remand at the conclusion of *coordinated* pretrial proceedings.

It would seem not only required, but more appropriate that when coordinated proceedings have concluded, the action be remanded to the transferor court regardless

of whether further case specific pretrial proceedings remain. Otherwise, unless the case is entirely resolved in the transferee court either by settlement or dismissal, the district judge in the transferor court will be trying a case with which he has absolutely no prior familiarity.

IV.

JPML RULE 7.6(d), BY WHICH THE JPML GIVES ALMOST CONCLUSIVE DEFERENCE TO THE TRANSFEREE JUDGE, VIOLATES 28 U.S.C. § 1407

JPML Rule 7.6(d) sets up its own system for remand, by asking the transferee district judge for an advisory opinion that by the terms of the rule itself it will almost never override. This is improper.

28 U.S.C. § 1407(a) clearly provides that the JPML, using its independent judgment, shall oversee remand. Congress could have chosen the simpler route of having the transferee court rule on remand itself without having the case go back to the JPML panel. This is indicative of a conscious intent that the JPML panel independently determine when remand is appropriate; there is no statutory authority to undermine that intent by punting the remand issue to the transferee court.

An independent JPML determination is not just required, but logical. A district court judge devoting substantial time and effort to a case develops a vested interest in that case. As noted in Judge Kozinski's prescient dissenting opinion, in advocating the position adopted by this Court in *Lexecon*, "Soon after the MDL process got underway, a peculiar thing started happening: Judges began to develop proprietary feelings toward the cases

entrusted to them . . . ." *In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation*, 102 F.3d 1524, 1540 (9th Cir. 1996) (Kozinski, J., dissenting), *reversed* in *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). While Judge Gleeson undoubtedly has the best of intentions in feeling responsible for guiding *Kayne* further toward trial prior to remand, when coordinated proceedings have concluded plaintiffs' choice of forum should govern. The parties are entitled to an independent determination by the JPML as to whether remand is appropriate, not predetermined by whether or not the district judge suggests remand.

CONCLUSION

JPML coordination serves a useful purpose when discovery common to multiple cases can be achieved in one forum. It should not be used as a mechanism to indefinitely delay a party's right to trial in the forum in which the case was originally filed. It is now over six years since *Kayne* was filed, and a trial date has yet to be set. The writ of certiorari should issue to clarify that remand to the original court for further pretrial proceedings is required when coordinated proceedings have ended.

Respectfully submitted,

LAWRENCE H. NAGLER
Counsel of Record
NAGLER & ASSOCIATES
2300 S. Sepulveda Blvd.
Los Angeles, CA 90064
(310) 473-1200
For Petitioners Fred Kayne, et al.

E.D.N.Y.
93-CV-0876
95-CV-2499
Gleeson, J.

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 9th day of January two thousand-one,

Present:

Hon. John M. Walker, Jr.,
Chief Judge

Hon. Roger J. Miner,

Hon. Rosemary S. Pooler,
Circuit Judges.

FILED JAN 9 2001

In re: Fred Kayne *et al*, Petitioners.	00-3059

Petitioners seek a writ of mandamus to direct the Judicial Panel on Multidistrict Litigation to remand this case for trial to the Central District of California, the court in which the original action was filed. Upon due consideration, it is hereby ORDERED that the petition be

DENIED. Petitioners have not sufficiently demonstrated that the Judicial Panel on Multidistrict Litigation clearly abused its discretion or usurped judicial power. *See United States v. Victoria-21*, 3 F.3d 571, 576 (2d Cir. 1993); *see also In re Joann Patenaude*, 210 F.3d 135, 143 (3d Cir. 2000) (stating that "the fact that all of the proceedings with which the individual action was 'coordinated' had already concluded [did not] raise a bar" to continued district court jurisdiction).

FOR THE COURT:
Roseann B. MacKechnie, Clerk

By: /s/ Lucille Carr

(Filed May 30, 2000)

DOCKET NO. 1059

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION
IN RE MTC TECHNOLOGIES COMPANY LTD. SECURITIES LITIGATION

***Fred Kayne, et al. v. MTC Electronic Technologies Co., Ltd., et al.*, E.D. New York, C.A. No. 1:95-2499 (formerly, C.D. California, C.A. No. 2:95-422)**

BEFORE JOHN F. NANGLE, CHAIRMAN, WILLIAM B. ENRIGHT, CLARENCE A. BRIMMER, JOHN F. GRADY, BAREFOOT SANDERS, LOUIS C. BECHTLE AND JOHN F. KEENAN, JUDGES OF THE PANEL

ORDER DENYING REMAND

Before the Panel is a motion for remand brought, pursuant to Rule 7.6, R.P.J.P.M.L., 181 F.R.D. 1, 11-13 (1998), by plaintiffs in the above-captioned action (*Kayne*) seeking remand of *Kayne* to the Central District of California from the Eastern District of New York, where it has been included in centralized pretrial proceedings occurring in this docket before the Honorable John Gleeson. Opposed to remand are various *Kayne* and MDL-1059 defendants.

On the basis of the papers filed and the hearing held, the Panel finds that remand of *Kayne* at this time is not appropriate. The following quotation from an earlier Panel opinion is very instructive for situations such as this, where no recommendation of remand has been made to the Panel by the transferee judge:

> The Panel's Rules of Procedure provide that the Panel shall consider the question of remand

> on the motion of any party, on the suggestion of the transferee court or on the Panel's own initiative. Rule [7.6(c)], R.P.J.P.M.L., [181] F.R.D. [1, 12 (1998)]. In considering the question of remand, the Panel has consistently given great weight to the transferee judge's determination that remand of a particular action at a particular time is appropriate because the transferee judge, after all, supervises the day-to-day pretrial proceedings. *See, e.g., In re IBM Peripheral EDP Devices Antitrust Litigation*, 407 F.Supp. 254, 256 (J.P.M.L. 1976). The transferee judge's notice of suggestion of remand to the Panel is obviously an indication that he perceives his role under Section 1407 to have ended. *In re Air Crash Disaster Near Dayton, Ohio, on March 9, 1967*, 386 F.Supp. 908, 909, (J.P.M.L. 1975). Absent a notice of suggestion of remand from the transferee judge to the Panel, any party advocating remand before the Panel bears a strong burden of persuasion. We rule that movants have not met this burden here and that the motion for remand is premature.

In re Holiday Magic Securities and Antitrust Litigation, 433 F.Supp. 1125, 1126 (J.P.M.L. 1977).

Judge Gleeson, in his capacity as transferee judge, has become thoroughly familiar with the issues in this complex docket involving claims asserted against a myriad of defendants arising out of sales of securities of MTC Technologies Co. Ltd. He has made great progress and has shepherded class settlements with respect to most of the principal defendants. Movants view these accomplishments as reasons why *Kayne* now can be remanded without further delay, but we view them instead as evidence of why Judge Gleeson is in the best position to

provide insight as to the future course of *Kayne* and the remaining MDL-1059 proceedings before him. We find that movants, having failed on four separate occasions (most recently at the end of October 1999) to persuade Judge Gleeson (or the magistrate judge assisting him in the management of this docket) that remand of *Kayne* was appropriate, have also failed to convince the Panel that it should order remand in the absence of a suggestion of remand from Judge Gleeson. Accordingly, we will deny remand.

IT IS THEREFORE ORDERED that the motion for Section 1407 remand of *Kayne* be, and the same hereby is, DENIED.

FOR THE PANEL,

/s/ John F. Nangle
John F. Nangle
Chairman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

ORDER

In re MTC ELECTRONIC TECHNOLOGIES SHAREHOLDER LITIGATION

Master File No. 93-CV-867 (JG)
MDL No. 1059

95-CV-2499 (JG)

THIS DOCUMENT RELATES TO:
FRED KAYNE, et al. v. MTC ELECTRONIC TECHNOLOGIES CO., LTD., et al.

APPEARANCES:

LAWRENCE H. NAGLER
ROBERT M. ZABB
Nagler & Associates
2300 S. Sepulveda Blvd.
Los Angeles, CA 90064
Attorney for Fred Kayne, *et al.*

GARY P. NAFTALIS
Kramer Levin Naftalis & Frankel
919 Third Ave.
New York, NY 10022
Attorney for Daiwa Securities America, Inc.

BRUCE S. KAPLAN
Friedman Kaplan & Seiler LLP
875 Third Ave.
New York, NY 10022-6255
Attorney for Robert Farr, *et al.*

GREGORY A. MARKEL
Brobeck Phleger & Harrison
1633 Broadway, 47th Floor
New York, NY 10019
Attorney for BDO Dunwoody

LEO D. PLOTKIN
Levy, Small & Lallas
815 Moraga Drive
Los Angeles, CA 90049
Attorney for HSBC Bank Canada

JOHN GLEESON, United States District Judge:

On June 1, 1999, I denied the plaintiffs' request for an order suggesting that the Judicial Panel on Multidistrict Litigation remand the case back to the Central District of California. Twenty-two days later the plaintiffs renewed their motion, and I referred the matter to Chief Magistrate Judge A. Simon Chrein for a report and recommendation.

On August 27, 1999, Judge Chrein recommended that I deny the renewed motion. For the reasons given in both Judge Chrein's opinion and in my June 1 order, the motion is denied.

So Ordered.

/s/ John Gleeson
John Gleeson, U.S.D.J.

Dated: October 27, 1999
Brooklyn, New York

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK	Master File No. 93-CV-876 (JG) 95-MD-1059
In re MTC ELECTRONIC TECHNOLOGIES SHAREHOLDERS LITIGATION	REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE A. SIMON CHREIN
FRED KAYNE, et al., Plaintiffs, – against – MTC ELECTRONICS TECHNOLOGIES CO., LTD., et al., Defendants.	95-CV-2499 (JG)

By order dated June 22, 1999, the Honorable John Gleeson referred to the undersigned, for a report and recommendation, the renewed motion of Plaintiffs under 28 U.S.C.A. § 1407(a) for an order suggesting that the Judicial Panel on Multidistrict Litigation ("JPML") remand the above-captioned matter to the Central District of California. For the reasons set forth herein, it is the respectful recommendation of the undersigned that Plaintiffs' motion be denied.

As expert discovery in the above-captioned matter appears to be ongoing, Judge Gleeson's familiarity with the issues involved in *In re MTC* continues to counsel against remand. In addition, there are pretrial motions in this case that remain to be resolved. Finally, Plaintiffs' renewed motion was made a mere twenty-two (22) days after Judge Gleeson's order of June 1, 1999 denying their

original motion to remand. In the intervening time period, the only *MTC*-related event that occurred was the withdrawal of third-party defendant Canaccord Capital from the following cases: *Farr v. Hong Kong Bank of Canada*, 96-CV-3129; *Farr v. Hong Kong Bank of Canada*, 96-CV-3130; and *Dunwoody v. Levesque Securities*, 97-CV-522. Cancaccord's withdrawal from these cases does not alter the landscape of *In re MTC* such that remand is now appropriate.

To the extent that the parties have relied on *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26 (1998), this reliance is misplaced. The narrow issue decided in *Lexecon* was "whether a district court conducting . . . 'pretrial proceedings' [under 28 U.S.C. § 1407(a)] may invoke § 1404 [under Title 28, the venue transfer statute] to assign a transferred case to itself for trial." *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 523 U.S. 26, ___ (1998). While the Lexecon Court might have uttered dicta useful to Plaintiffs, Defendants, or both parties, its holding was inapposite to the present motion. It should also be noted that Defendants are correct to point out that a case may be a "coordinated case" even if the JPML has not itself taken action on it; the JPML Rules indicate that "Potential 'tag-along actions' filed in the transferee district require no action on the part of the Panel," JPML Rule 7.5(a), and define "tag-along action" as one "pending in a district court and involving common questions of fact with actions previously transferred under § 1407." JPML Rule 1.1.

Counsel for Plaintiffs is hereby directed to serve a copy of this report and recommendation on all parties that have appeared in the above-captioned matter.

CONCLUSION

For the foregoing reasons, it is the respectful recommendation of the undersigned that Plaintiffs' renewed motion for an order suggesting remand be denied. Any objections to the recommendation contained herein must be filed with the Honorable John Gleeson on or before September 13, 1999. 28 U.S.C. § 636; Fed. R. Civ. P. 6, 72. Failure to object will preclude appellate review.

Dated: Brooklyn, New York
August 27, 1999

/s/ A. Simon Chrein
A. SIMON CHREIN
United States Magistrate
Judge

UNITED STATES
DISTRICT COURT
EASTERN DISTRICT OF
NEW YORK

ORDER

CV 93-0867 (JG)

IN Re

MTC ELECTRONIC
TECHNOLOGIES
SHAREHOLDER
LITIGATION

CV 95-2499 (JG)

MDL No. 1059

This Document Relates to:

FRED KAYNE, et al. v.
MTC ELECTRONIC
TECHNOLOGIES CO.,
LTD., et al.

JOHN GLEESON, United States District Judge:

Relying on *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 118 S. Ct. 956 (1998), plaintiffs have moved under 28 U.S.C. § 1407(a) for an order suggesting that the Judicial Panel on Multidistrict Litigation remand the case to the Central District of California. The motion is premised on the plaintiffs' assertion that the "coordinated" pretrial proceedings envisioned by 28 U.S.C. § 1407(a) have been concluded.

I disagree. There are various MTC Electronic Technologies-related matters other than *Kayne* still pending before me, and I am persuaded that the efficiencies achieved by coordinated pretrial proceedings counsel against a suggestion for a remand at this time. Accordingly, the motion is denied.

The denial of plaintiffs' motion is without prejudice to its renewal as the remaining pretrial proceedings progress. A renewed application need not await the conclusion of all such proceedings.

So Ordered,

/s/ John Gleeson
John Gleeson, U.S.D.J.

Dated: Brooklyn, New York
June 1, 1999